Supreme Court, U.S.
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No. 91-6646

In The

Supreme Court of the United States

October Term, 1992

VERL HADLEY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

JOHN TREBON
(appointed by this Court)
Security Pacific Bank Building
121 E. Birch Avenue, Suite 207
Flagstaff, Arizona 86001
(602) 779-1713

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

A. JUDICIAL ADMISSIONS SHOULD BE WEIGHED AS AN IMPORTANT FACTOR UNDER RULE 403 IN APPROPRIATE CASES

A split between the federal circuit courts exists on the question of whether or not the trial court must consider a judicial admission or proposed stipulation on a technical issue of "specific intent" as an alternative to admitting extremely prejudicial prior bad acts, as part of the balancing process required by Rule 403, Federal Rules of Evidence. Mr. Hadley contends that the statutory element of "intent" (touching for sexual gratification) was not contested at trial and could easily be inferred from the nature of the acts charged (placing lotion on the penis of another or attempted sodomy). Therefore, his proposed stipulation rationally eliminated the issue of "intent" without detracting from the government's ability to fairly prove its case with legitimate evidence.

The government argues that it was justified in presenting evidence of more than a dozen hotly contested prior acts of sodomy between Mr. Hadley and other male adolescents that occurred up to seventeen years earlier in order to prove that his "intent" in touching children was for the purpose of sexual gratification. We submit that the government's position is disingenuous. Since "intent" was not a disputed issue at trial and was easily shown from the nature of the alleged acts alone, the government's real goal was to prove that Mr. Hadley was guilty of the physical acts or touchings at issue by showing that he was acting in conformity with his supposed past misdeeds.

In light of the extreme prejudice flowing from the prior uncharged misconduct evidence, "[t]he availability of other means of proof" was an important factor to consider under Rule 403. See Notes of Advisory Committee to Rule 403. The Court of Appeals for the Ninth Circuit flatly rejected the proposed stipulation since a "specific intent" crime had been charged. But the government has now conceded the issue. It agrees that a judicial admission should be considered as an

important factor under Rule 403. (Br. of U.S. at p. 34 and n. 19).

Yet, the government insists that the judgment of the trial court and the decision of the Ninth Circuit should be upheld even though both courts below refused to give any real weight to the proposed stipulation. The government asks this Court to sustain the admission of the prior bad acts on appeal without requiring the courts below to fully consider the proposed stipulation as part of the balancing process under Rule 403 in the first instance.

Indeed, the government urges this Court not only to sit as a trial court but to engage in the balancing process required under Rule 403 by considering arguments and factors not advanced below.[1] The government has tacitly conceded that it cannot successfully support the decision of both courts below, which allow massive evidence of prior bad acts without fairly considering Mr. Hadley's proposed stipulation or judicial admission.[2]

To be sure, we realize that the government has made a rather slick move. Rather than directly address the troubling "questions presented" by the petitioner, the government has attempted to shift the focus of this court's review by submitting, for instance, that Mr. Hadley's "principal contention" is that the trial court erred by not excluding the prior bad acts under Rule 403. The main thrust of Mr. Hadley's petition, however, is that the proposed stipulation or judicial admission was appropriate in this case. It would have allowed the trial court to protect Mr. Hadley from substantial, unfair prejudice while promoting the government's ability and duty to prove

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[1] Since the government did not file a cross-petition, it may defend its judgment only on grounds properly raised below. Stern, Gressman & Shapiro, *Supreme Court Practice*, Sec. 63.5 (Sixth Ed. 1986).

[2] At trial, the government responded to the proposed stipulation or admission by stating: "I would not be prepared to do that." In turn, the trial court ruled: "Well, you can discuss that with Mr. Husk. I would not require him to do that." (R.T., Vol. 4, p. 687, J.A. 30). The Court of Appeals held that judicial admissions need not be considered when a "specific intent" crime has been charged. 918 F. 2d 848, 851-52 (9th Cir. 1990) (J.A. 177-78).

the specific acts charged in the indictment. It would have preserved a fair trial.

The judicial admission would have tipped the balancing scales of Rule 403 in favor of excluding the prior bad acts. The need or probative value of the prior bad acts would have been lessened, while the extreme prejudice would have become unnecessary and intolerable.[3] The important issue concerning judicial admissions, spotlighted by a split in the circuit courts, should be squarely addressed by this Court – even if the government was not up to the task.

B. THE ROLE OF THE PRIOR BAD ACTS ACCORDING TO THE GOVERNMENT – A REVISIONIST'S ATTEMPT TO RESHAPE THE FACTORS UNDER RULE 403.

Rather than point to "evidence" and testimony showing that the slight issue of "intent" was disputed at trial to justify the admission of prior bad acts, the government relies upon the opening statement of defense counsel, as well as, a pre-trial motion submitted by defense counsel raising the plausibility of a consent defense to several counts involving Cory K. The government argues that the prior bad acts were necessary to overcome these items of non-evidence (Br. of U.S. at pp. 3, 10, 22 and 38). Counsel for Mr. Hadley withdrew any proposal of a "consent defense" to the counts involving Cory K. during the telephonic conference that occurred on April 27, 1989. (R.T. April 27, 1989, at pp. 8-12).[4]

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[3] The careful use of judicial admissions in appropriate cases would also discourage "intellectual dishonesty" by trial court litigants. The persistent practice of arguing for the admission of prior bad acts to promote one of the "other purposes" under Rule 404(b) as mere legal lip service, while actually hoping to influence the jury with damaging bad character evidence, should be discouraged. The ends do not justify the means in our business. The intelligent use of judicial admissions or stipulations would not only promote fair trials, but also the credibility of lawyers and judges alike.

[4] As related during trial, a "consent issue" existed regarding Cory K. because Mr. K. had indicated to both Morris Singer and Arnold Dobi that he had carried on a consensual relationship with Mr. Hadley. (R.T., Vol. 3, pp. 666-67, J.A. 19-20). As indicated by defense counsel, the issue of "consent" could be raised without any

The government also argues that the indictment was severed immediately prior to trial in order to accommodate the request of defense counsel. (Br. of U.S. at p. 3). But, the government does not present the issue or facts in perspective. Indeed, counsel for Mr. Hadley requested that all of the counts involving Cory K. should be tried separately from all other counts in the indictment. The trial court, however, refused to sever the counts as requested by defense counsel. (See R.T., April 27, 1989, at pp. 10-12). Moreover, the severance did not benefit Mr. Hadley during trial. Judge Carroll ruled that all of the other counts of the indictment could be admitted as prior bad acts during the first trial.

The government not only argues that prior bad act evidence was admissible to rebut defense counsel's opening statement, but it also insinuates that defense counsel's opening statement was not supported by any evidence introduced at trial. (See, e.g., Br. of U.S. at pp. 10 and 38). We beg to differ.

Defense counsel for Mr. Hadley made a relatively brief opening statement. The opening statement consumed eight pages of the trial court transcript. (R.T., Vol. 2, at pp. 344-352). Counsel correctly informed the jury that the F.B.I. was under pressure to identify and solve the problem of sexual abuse by teachers on the Navajo Indian Reservation. (R.T., Vol. 2, at p. 346). Counsel told the jury that the F.B.I. agents used "aggressive interview tactics". (R.T., Vol. 2, at p. 349). Counsel asked the jury to consider whether or not the children had been coached or pressured into making statements against Verl Hadley. (R.T., Vol. 2, at p. 350).

Defense counsel's overview of the case was supported by almost every witness that testified, including the alleged victims. For instance, Jonathan T. admitted that he "made up" a story against Verl Hadley for the F.B.I. He testified that he

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testimony from Verl Hadley. It is the inconsistent statements of Cory K., not Verl Hadley, that would have allowed counsel to present a "consent" defense at a separate trial against the charges of sodomy by force. Once again, Mr. Hadley never indicated that he had engaged in consensual, sexual activity with Cory K. The government is seemingly grasping at straws.

was afraid of the F.B.I. (Def. Ex. "I", J.A. 159-60). Amadee R., like virtually every other minor, was interviewed by F.B.I. agents without parental permission or the presence of any adult other than law enforcement officials. The F.B.I. told Amadee R. that he could not leave the room during the interview. Amadee R. testified that he was afraid of the F.B.I. agents. He admitted that he felt that he had to tell the F.B.I. agents something about Verl Hadley before he could leave the room. (R.T., Vol. 3, at pp. 574-575, 605-06).[5]

In his opening statement, defense counsel told the jury that the F.B.I. had interviewed all of the sixth, seventh, and eighth grade students at the Chilchinbeto School. (R.T., Vol.

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[5] One of the witnesses listed by the government to support evidence of prior bad acts, Junior H., testified for the defense. He testified that he repeatedly told the F.B.I. that Verl Hadley had not touched him. Nevertheless, F.B.I. Agent Schafer accused Junior H. of lying. The F.B.I. agents told Junior H. that they would not allow him to leave until he told the truth. If he had to go to the bathroom they would go with him. (R.T., Vol. 5, at p. 1002). F.B.I. agents told Junior H. that he had been seen in a car doing something "bad" with Verl Hadley. (R.T., Vol. 5, at p. 1004). Junior H. testified that he was eventually forced by the F.B.I. to make up stories about Verl Hadley. (R.T., Vol. 5, at pp. 1004-06).

Later, Junior H. told other members of his family that he had been forced to lie about Verl Hadley. He missed eleven days of school because he was upset about the incident. He subsequently contacted the F.B.I. and told them that his stories about Verl Hadley were not true. (R.T. Vol. 5, at pp. 1005-10).

Similarly, Travis Y. was also slated to testify about prior bad acts involving Verl Hadley. But, he also accused the F.B.I. agents of pressuring him to make incriminating statements about Mr. Hadley that were untrue. (R.T., Vol. 4, at pp. 816-44). His statements were consistent with many other witnesses who testified that the F.B.I. pressured them into making incriminating statements against Mr. Hadley.

Another student at the Chilchinbeto School, Dwayne C., age fifteen, testified that the F.B.I. accused him of not telling the truth when he told them that Verl Hadley had not touched him. (R.T. Vol. 5, at p. 1038). Marlow S., age fifteen, also testified that he was repeatedly interviewed by F.B.I. agents. Although he informed the F.B.I. that Verl Hadley had never touched him inappropriately, the F.B.I. insisted that he was not telling the truth. (R.T., Vol. 6, at pp. 1077-78). Wanda Chief, age eighteen, testified that she was offensively grabbed by an unknown F.B.I. agent during the investigation of Verl Hadley. Ms. Chief testified that she was threatened by the agent. (R.T., Vol. 6, at pp. 1199-1201). Also see the testimony of Duane B. (R.T., Vol. 5, pp. 1036-38).

2, at pp. 348-49). Agent Schafer confirmed that he had interviewed in excess of 75 students, including all sixth, seventh, and eighth graders at the Chilchinbeto School. Agent Schafer did not begin his investigation at the school because Verl Hadley was considered a suspect, but interviewed students while "conducting a parallel investigation in regards to another child molester". (R.T., Vol. 8, at p. 1473). At one point, Agent Schafer was informed by Agent McIlwaine that Junior H. had complained that Agent Schafer accused him of being a liar. (R.T., Vol. 8, at p. 1488).

Agent Schafer admitted that he often told students that he was conducting an investigation against Verl Hadley and that several other children had admitted that Verl Hadley had improperly touched them. (R.T., Vol. 8, at p. 1488). At times, he told the students that he didn't believe them when they told him that Verl Hadley had not touched them improperly. (R.T., Vol. 2, at p. 1489). Indeed, Agent Schafer admitted that he told several of the students that they could be prosecuted for perjury. (R.T., Vol. 2, at 1490). No wonder so many of the students felt that he had intimidated them.

While the government was allowed to rebut evidence of F.B.I. intimidation with testimony of proper interviewing techniques, neither the opening statement of defense counsel nor the testimony of the students opened the door to prior bad act evidence. Instead, the testimony framed the appropriate issue in this case. Did Amadee R. accurately accuse Verl Hadley of improperly touching him or did he, as contended by Jonathan T., make up stories about Verl Hadley as well. To be sure, even Amadee R. admitted that he was afraid of the F.B.I. and conceded that he felt pressured to make accusations against Hadley in order to get the F.B.I. to leave him alone.[6]

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[6] Yet, the government attempts to justify the testimony of Kyle Hartman on the basis of defense counsel's "opening statement". (Br. of U.S. at p. 10). While Mr. Hadley was on trial for "touching" the students named within the indictment, Kyle Hartman testified not only that Verl Hadley had sodomized him, but that he had sodomized Verl Hadley as well. (R.T., Vol. 9, at p. 1670, J.A. 130-31).

C. GOOD CHARACTER NEVER PRESENTED.

At several points in the brief for the United States, the government indicates that the prior bad acts admitted against Mr. Hadley were admitted in order to rebut a "good character" defense proffered by Mr. Hadley and his attorney. (See Br. of U.S. at n. 2-3).[7] The defense cross-examined the government's witnesses by showing them that Verl Hadley obtained a pair of sweatpants to replace a pair of torn pants that Jonathan T. was wearing at school. (R.T., Vol. 2, pp. 428-37). (See Br. of Pet. at p. 4). Defense counsel's questions relating to the incident involving the sweatpants clearly did not constitute an attempt to present evidence of "good character". The fact that Mr. Hadley was assigned to "Children Incorporated" at his school simply explained why he was the custodian of spare clothes purchased by the organization. He obtained an extra pair of pants for Jonathan T. because he was the custodian of spare clothes at the school. (R.T., Vol. 7, pp. 1270-71). Since the touching incident with Jonathan T. supposedly occurred when he changed from his torn pants to the sweatpants provided by Mr. Hadley, it was necessary to explain why Mr. Hadley was the person that retrieved the sweatpants. No "good character" defense was presented.[8]

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[7] To be sure, the brief portions of the transcripts quoted by the government do not fairly reflect the exchange between the trial court and defense counsel. (See R.T., Vol. 8, pp. 659-676, J.A. 14-25).

[8] Indeed, the government's quote from the record, at fn. 2, curiously omits the last sentence or question uttered by Judge Carroll. Instead of making a finding or statement regarding the defense raised by Mr. Hadley, Judge Carroll asked "that is your intent and motive?" Defense counsel answered the query by stating that he had no intent or motive to raise a good character defense. A review of the entire trial court record will show that defense counsel did not ever open the door to prior bad act evidence by challenging the issue of intent or motive. No good character defense was ever presented. The government's apparent contention to the contrary is mistaken as a matter of fact and misleading as a matter of law.

The same conclusions will be reached if fn. 3. of the Brief of the United States is carefully examined and placed in perspective. Defense counsel simply cross-examined Amadee R. relating to the specific incidents in question. If defense counsel raised the issue of "intent" by questioning any of the witnesses, the government has certainly failed to point to the relevant portions of the record

D. PROPOSED STIPULATION ELIMINATED ISSUE OF "INTENT".

The Brief of the United States attempts to belittle defense counsel's proposed stipulation or judicial admission relating to "intent" by referring only to a small portion of the proposed stipulation. (See, Br. of U.S. at n.4). Mr. Hadley's attorney repeatedly offered a comprehensive stipulation that would have unequivocally eliminated the issue of "intent" or "motive" from the trial. (Also see R.T., Vol. 4, p. 687, J.A. 29-30; R.T. Vol. 4, pp. 856-57; Vol. 5, pp. 879-884, J.A. 33-36; Supplemental Memorandum in Opposition to Government's Motion in Limine, J.A. 167-71).

The government relies upon Judge Carroll's refusal to accept the proffered stipulation from Mr. Hadley's attorney. The government complains that defense counsel only offered to stipulate to the issue of mens rea, not actus rea. (See Br. of U.S. at p. 8). The proposed stipulation eliminated the need for prior misconduct evidence to establish the slight issue of "intent" required by federal statute. The government essentially argues that the accused citizen may plead guilty to the entire indictment; but that no lesser admission would ever be relevant to consider as part of the balancing process under Rule 403. But, the Advisory Committee notes that Rule 403 specifically directs the trial judge to consider "alternative means of proof", as well as, "the exclusion of evidence offered to prove a point conceded by the opponent."

Although the government contends that Mr. Hadley's stipulation was inadequate, it persistently fails to state why and how the stipulation was supposedly inadequate to establish the mens rea in question. Mr. Hadley did not argue that "if he sexually abused the children, he did so for sexual pleasure". (Br. of U.S. at p. 16). Instead, Mr. Hadley stipulated that the requisite intent required by federal statute would be met if the jury found that he touched any of the

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supporting its supposed theory. If this Court examines defense counsel's cross-examination of Amadee R., it will find that no such issue was raised. (See R.T., Vol. 3, 560-597).

minor children in any private area. Once again, the government's attempt to change the posture of Mr. Hadley's proposed stipulation seems to indicate its inability to overcome the full force and logic of the stipulation.

E. TESTIMONY OF VERL HADLEY.

The government makes much of the fact that defense counsel asked Mr. Hadley whether or not he had sexual relations with other minors during 1984-85. (See Br. of U.S. at p. 11). But, the government has creatively quoted only part of counsel's question and refused to place it in context.

When Mr. Hadley was interrogated by Agent Schafer, Mr. Hadley was told that he could either get probation and counseling or prison for a very, very long time without any possibility of parole. (R.T., Vol. 8, at p. 1522). But, Agent Schafer told Hadley that "in order for him to get counseling, there has to be a problem. If there was a problem, then he will most certainly have to cooperate and tell people what the problem is in order for them to give him the proper type of counseling." (R.T., Vol. 8, at p. 1525). Agent Schafer further advised Mr. Hadley that, if he did not cooperate by making a statement, then Agent Schafer would be forced to play "hard ball" with him. (R.T., Vol. 8, at p. 1514). After Mr. Hadley asked for a lawyer, Agent Schafer told him "there is a distinct possibility that you will be arrested and if your lawyer won't let me talk to you, the next time I will see you is when I arrest you." (R.T., Vol. 8, at p. 1518).

As a result, Verl Hadley agreed to talk to Agent Schafer during his second interview. He told Agent Schafer that he had a drinking problem from 1984-85 while his father became ill and later died. (R.T., Vol. 8, at pp. 1529-30). He told Schafer that the drinking problem affected his mental health. He provided Schafer with a written statement. (R.T., Vol. 7, pp. 1320-23).

Agent Schafer testified that Mr. Hadley told him that it is "possible" that he had sexual relations with boys during the period of time that he was drinking heavily since he was not fully aware of what he was doing. (R.T., Vol. 8, p. 1461). Mr.

Hadley denied making such statements to Agent Schafer. They were not in his written statement. The third party present during the interview, Mr. John Yazzie, confirmed that Mr. Hadley denied having sexual relations with Cory K. or others. (R.T., Vol. 8, pp. 1542-53).

As a result of Agent Schafer's testimony, defense counsel simply asked Mr. Hadley whether or not he had "sexual relationships with other minors" during "the period of time that you were consuming alcohol" for the period of 1984-85. (R.T., Vol. 7, at p. 1326). Although the trial court and the government later accused defense counsel of asking "carefully phrased questions on direct, with respect to time frames and other matters", the record simply shows that defense counsel attempted to rebut the testimony of Agent Schafer that Mr. Hadley was drinking so heavily during 1984-85 that he could have molested students because he was too drunk to know what he was doing. To be sure, the rather straightforward questioning of defense counsel did not logically open the door to other prior misconduct evidence and was not carefully crafted to raise the inference that Verl Hadley never associated with any minor students.

The government repeatedly justifies the admission of prior misconduct evidence upon the supposed defense raised by Mr. Hadley that he "had a strictly benevolent relationship with the child victims and had never had intercourse with any minor males." (Br. of U.S. at pp. 12, 19, 22, 23, and 28). But, the "benevolent relationship" issue has been created by the government. It was never used by Mr. Hadley. The terminology or its equivalent does not appear in the record documenting the testimony of Mr. Hadley or his witnesses.

In this same vein, Mr. Hadley explained that he took students on swimming trips. But, Mr. Hadley explained his actions in accompanying students on swimming trips simply because Amadee R. accused him of misconduct during such a trip. Mr. Hadley's testimony centered upon the specific facts of the case; but did not constitute an affirmative defense. According to the government, the defense opened the door to prior misconduct evidence by simply asking Mr. Hadley to deny the charges against him. The government relies upon Mr. Hadley's testimony relating to Amadee R. to

argue that a good character defense was presented. (See R.T., Vol. 7, at pp. 1281-92; Br. of U.S. at p. 23).

The introduction of Kyle Hartman's testimony did not rebut Mr. Hadley's testimony. Instead, it injected new, undisclosed issues into the case. It is simply silly to pretend that Mr. Hadley's testimony, which denied the substance of the indictment against him, opened the door to testimony from Kyle Hartman relating to supposed misconduct that occurred seventeen years earlier.

Mr. Hadley never presented any evidence whatsoever that he somehow innocently or accidentally placed lotion on Amadee R. or anyone else. The government has ascribed a defense to Mr. Hadley that was never used. (See Br. of U.S. at pp. 15, 21).

Of course, the testimony of Cory K. and Kyle Hartman do not tend to rebut Mr. Hadley's defense that F.B.I. agents had manipulated the minor victims to testify against Mr. Hadley. Instead, the prior uncharged misconduct evidence merely constitutes circumstantial evidence of character. The government's use of the prior misconduct evidence is, at best, an attempt to show that Mr. Hadley has a propensity to commit acts of sexual misconduct against adolescent males. The obvious thrust of the government's case was to show that since Mr. Hadley has arguably done such acts in the past, he probably did them in this case as well. Therefore, his assertion that the F.B.I. agents had manipulated the minor victims in this case should be rejected – not on the basis of specific evidence in this case – but on the basis that Mr. Hadley has shown a propensity to commit crimes like those charged in this case. (See Br. of the U.S. at p. 15).

The government contends that the evidence of prior uncharged misconduct evidence was not used to show that Mr. Hadley acted in conformity with uncharged misdeeds. Somehow, the government argues that its use of the evidence to show that Mr. Hadley "engaged in a distinctive pattern of behavior" over a period of time does not constitute propensity evidence.

F. CHARACTER EVIDENCE UNDER THE FEDERAL RULES OF EVIDENCE.

It is surprising to find that the government has failed to grasp the meaning of character evidence under the Federal

Rules of Evidence. Perhaps, the government's failure to grasp the meaning of character evidence stems from its limited review of applicable law. The government's rather unique construction of the character rules withers in light of clearly accepted principles established by the vast majority of federal cases construing them.

The government attempts to narrowly constrict the meaning of "character". (Br. of U.S. at pp. 24-25). Then, the government argues that prior bad acts are always admissible, apparently without limitation by any rule of evidence except the general relevancy standard of Rule 401, unless they are offered to prove "a person's moral qualities in order to draw inferences about how he behaved on a particular occasion." *Ibid.* at 25.

The government's argument, which is one of its pivotal points before this Court, is misplaced for numerous reasons. Rule 404(b) explicitly states that evidence of other crimes, wrongs or acts is not admissible "to show action in conformity therewith." In other words, one cannot prove that the accused citizen is guilty of sexual misconduct on one occasion by showing that he or she was guilty of a similar act on a previous occasion. Yet, the government repeatedly argues that the prior bad acts of Verl Hadley were properly admitted at trial because they show that he "has engaged in a pattern of distinctive behavior that includes the conduct with which he is charged." (Br. of U.S. at pp. 26, 16, and 20).

The government complains that Rule 404(b) only limits the use of extrinsic act evidence to prove "character" – not "propensity". (Br. of U.S. at n. 14). The myopic distinction is misplaced and somewhat irrelevant.

First of all, the definition of "character" taken by the government from one or two dictionaries simply does not comport with the broad use of character evidence under the federal rules.[9]

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[9] Indeed, the definition of "character" is much broader – even by dictionary standards. By common understanding, "character" refers to "one of the attributes or features that make up and distinguish the individual . . . the complex of mental and ethical traits making a person". See Merriam Webster's Seventh New Collegiate Dictionary (1970). In other words, the inclination of a person to act in conformity with his or her character essentially makes up not only the substance of Rule 404(b), but also parallels the definition of the term "propensity".

> The prohibition in the first sentence of [Rule 404(b)] has two components. First, the sentence refers to the use of the uncharged acts "to prove the character of a person." The language, "the character of a person," refers to proof that the defendant is inclined to wrongdoing in general or that the defendant tends to commit a particular type of wrongdoing; thus, the prosecutor may not prove that the defendant is either generally a criminal or more particularly a rapist or a burglar.
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> * * *
>
> Evidence of a criminal defendant's uncharged misconduct creates the risk that the jury will penalize the defendant for his bad character.

Imwinkelried, *Uncharged Misconduct Evidence*, Sections 2:18, 1:13, and 1:03 (1984 and 1992 Supp.). In other words, Rule 404(b) refers to the use of circumstantial evidence of past misdeeds to show that the accused citizen acted in conformity therewith for the charges on trial. Yet, Rule 404(b) prohibits the use of prior uncharged misconduct to establish a criminal predisposition, propensity or inclination of the accused citizen to commit the specific act for which he or she is on trial. That is why courts and commentators almost universally use the term "propensity". Rule 404(b) directly addresses one's criminal predisposition or propensity to commit specific misdeeds. See, e.g., *Comments, Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. Rev. 261, 263 (1977) ("This basic tenet of evidence law is recognized by every major commentator", citing Wigmore and others. At n. 16); Guldenschuh, *Federal Rules of Evidence – Rule 404(b) Limits the Admission of other Crimes Evidence, Under an Inclusionary Approach, to Cases Where it is Relevant to an Issue in Dispute*, 55 Notre Dame Lawyer 574, 577 (1980); J. Weinstein and M. Berger,

Weinstein's Evidence, Section 404[09] (1985). The attempt to show a trait of character by evidence of prior misdeeds is "sometimes described as 'circumstantial' use of character." Graham, *Handbook of Federal Evidence*, Section 404.1 (3rd Edition, 1991).

Moreover, the government's attempt to redefine "character" for purposes of Rule 404(b) is actually taken, although somewhat out of context, from Professor Kuhns' article entitled, "*The Propensity to Misunderstand the Character of Specific Act Evidence*", 66 Iowa L. Rev. 777, 779 (1981) [hereinafter referred to as "Specific Act Evidence"]. But, Professor Kuhns plainly states that the term "character" is "commonly understood" to have two attributes. *Specific Act Evidence* at 779. Although the government uses the first attribute cited by Professor Kuhns, it omitted the second attribute. (See Br. of U.S. at n. 13).

> The second attribute of character is suggested by the fact that the prohibition against specific acts evidence to prove character is limited to showing action in conformity with character . . . Or, to put it somewhat differently, proof of a person's character trait is proof that a person has a propensity to behave in a particular manner. Indeed, the terms "character" and "propensity" are often used interchangeably, and the prohibition against specific act evidence is frequently described as a prohibition against the use of specific acts for propensity purposes.

Specific Act Evidence at pp. 779-780. The purpose of Professor Kuhns' article was to show "that neither the concept of propensity nor the concept of character is helpful to an understanding of how courts have ruled or should rule on the admissibility of specific acts evidence." *Specific Act Evidence* at p. 781. In the end, Professor Kuhns suggests that Rule 404 should be amended. He suggests the desirability of articulating a balancing test that is less favorable to admissibility than the test set forth in Rule 403. *Specific Act Evidence* at p. 810.

As this Court has noted, "[e]xtrinsic acts evidence may be critical to the establishment of the truth as to a **disputed issue**, especially when that issue involves the actor's state of mind and the **only means of ascertaining that mental state** is by drawing inferences from the conduct." *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (emphasis added). AS recognized by the Advisory Committee on Rule 401, which defines "relevant evidence", "situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent . . . ". "[U]ndue prejudice" should be considered in determining whether or not a concession or stipulation should be accepted.

The "mental state" of Mr. Hadley was never a disputed issue at trial. Moreover, the requisite "intent" is necessarily inferred from the act of touching someone on their sexual organs. No lingering question of "intent" remained.

The government did not dispute that intent could be inferred from the nature of the act alone. *See, United States v. Gruttadauro*, 818 F.2d 1323, 1327-28 (7th Cir. 1987).

> The court acknowledged that prior bad acts evidence is ordinarily used to show intent when the defendant has admitted the action but denied any culpable mental state. By framing the defense in this way, the defendant specifically raises the issue of intent. In the absence of such a defense, however, intent may not be an issue, thus obviating the need for the prior bad acts evidence.

Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604, 608 (1989). But, the government now insists that it should be allowed to introduce evidence of prior bad acts to prove the physical actions in controversy, rather than the culpable mental state. At trial, however, the government argued that the evidence was admissible to establish "intent". The new argument simply represents a classic example of an attempt to justify the admission of prior bad acts in order to show that the accused citizen acted in conformity therewith.

In *Huddleston*, this Court expressed its "concern that unduly prejudicial evidence might be introduced under Rule

404(b)". This Court stated "that the protection against such unfair prejudice emanates from the requirement of Rule 404(b) that the evidence be offered for a proper purpose . . . [and] from the assessment that the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice," and otherwise. 485 U.S. 681, 691 (1988). In Mr. Hadley's case, the proper purpose allowed by the trial court was "intent". The improper purpose would have been to use the extrinsic act evidence to establish the likelihood that Mr. Hadley acted in conformity with his past misdeeds.

Mr. Hadley never contended that the touchings in this case occurred, but involved only accidental or innocent touchings. Therefore, the government was never required to overcome a defense of mistake or accident. Yet, the government now mistakenly relies upon *State v. Edward Charles L.*, 398 S.E. 2d 123, 131-33 (W.Va. 1990). First, Edward Charles L. explicitly raised the defense of accident. Second, the Supreme Court of Appeals of West Virginia expressly created a "sexual propensity exception" to Rule 404(b). The exception is not allowed by the Federal Rules of Evidence. Moreover, the West Virginia Court only allowed evidence of prior sexual misdeeds between the victim at trial and the defendant. Evidence of prior misconduct involving third persons was not allowed.

The government complains that reasonable doubt may have pervaded the testimony of Amadee R. without the propensity evidence provided by Cory K. and Kyle Hartman. (See Br. of U.S. at p. 20). The government's fear that the jury may have believed that Amadee R. "made it up" was based upon the direct testimony of Jonathan T., who stated that Amadee R. told him that he had made up stories about Verl Hadley. (Def. Ex. "I", J.A. 159-61).

As conceded by the government, the jury would be less likely to resolve the dispute between Jonathan T. and Amadee R. if they were presented with evidence of prior misconduct by Mr. Hadley. (Br. of U.S. at p. 21). In other words, the

evidence was admitted to show that Verl Hadley acted in conformity with his past, uncharged misdeeds.

The government surprisingly relies upon the prior uncharged misconduct evidence as a "pattern of conduct [that] may reflect a person's *modus operandi* . . . ". (Br. of U.S. at p. 26). But, evidence of *modus operandi* is used to establish "identity", not propensity. Of course, the government never offered the evidence to establish "modus operandi" or "identity". In any event, there was never any question about "identity" in this case. All of the students knew Mr. Hadley. The only question was whether or not Mr. Hadley touched them as they suggested.[10]

To be sure, evidence of uncharged misconduct is excluded from jury trials for the well documented reason that juries tend to punish the defendant because he has been shown to be a "bad man". The extrinsic act evidence did not prove that Mr. Hadley committed the acts charged in the indictment. Instead, the evidence tended to indicate that Mr. Hadley was a "bad man" deserving of punishment. It tended to induce a compromise verdict in spite of the fact that reasonable doubts may have pervaded the acts charged. As the notes of The Advisory Committee on the 1972 Proposed rules provide, the rule against propensity evidence "is so deeply imbedded in

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[10] The cases relied upon by the government at p. 26 of its brief relate to "signature crimes" to establish "identity". See, e.g., *United States v. Hudson*, 84 F. 2d 1016, 1021, (7th Cir. 1989). Although the government later argues that "[n]o one disputes [the] general proposition" that an offer to concede or stipulate the issue of intent should be a relevant fact to consider under Rule 403, *Hudson* shows that the 7th Circuit has expressly taken the position that stipulations will not be considered under Rule 403 if a "specific intent" crime has been charged. See *United States v. Hudson*, 884 F. 2d 1016, 1022 (7th Cir. 1989). To be sure, this case was accepted by the United States Supreme Court to resolve the issue of whether or not a proposed stipulation should be a relevant factor to consider under Rule 403. The issue obviously remains viable even though the government would like to avoid it within the context of this case.

The issue in this case is whether or not the proposed stipulation should have been considered under Rule 403. Once considered, the remaining issue is whether or not the proposed stipulation would have fairly eliminated the issue of intent, yet simultaneously allowed the government to present its full case against Mr. Hadley without resorting to the use of prior misconduct evidence for an improper purpose.

our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." Character evidence "tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of the respective characters despite what the evidence in the case shows actually happened." (See Br. of Pet. at p. 14a). Evidence of specific instances of conduct "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently, the rule confines the use of evidence of this kind in cases in which character is, in the strictest sense, in issue and is deserving of a searching inquiry." Notes of Advisory Committee on 1972 Proposed Rules, Rule 405; (Br. of Pet. at p. 20a).

Finally, the government has chosen not to refute any of the modern studies which unequivocally show that juries tend to convict persons on a lesser standard of proof if prior uncharged misconduct evidence is presented to them. In other words, if enough mud is thrown against the wall, some will stick. Instead, the government asks this Court to engage in the fanciful notion that a "rational jury can be expected to reject [the implication of propensity] on its own, reasoning that character based inferences are not reliable." (Br. of U.S. at p. 37). We submit that the fanciful notions of the government about how juries behave is no substitute for empirical evidence and careful application of Rules 403 and 404(b). Also see Imwinkelried and Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 Pacific L.J. 1005, 1038-41 (1992) (empirical evidence update).

In the same vein, we can no longer presume that juries follow instructions regarding prior bad act evidence. The vast amount of empirical evidence shows otherwise. Moreover, the ineffective use of a limiting instruction should not allow the misuse of uncharged misconduct evidence in the first instance. The "practical and human limitations of the jury system cannot be ignored". *Bruton v. United States*, 391 U.S. 123, 135 (1968). The government's contention that the danger of unfair prejudice could be controlled with the use of a limiting instruction in a case involving explicit sexual acts against children is unconvincing.

G. UNFAIR SURPRISE.

The government dismisses Mr. Hadley's claim of unfair surprise by submitting that the "government announced on a Thursday that it had located Hartman and intended to call him as a witness. J.A. 48. Hartman did not testify until the following Tuesday." The government's argument is that counsel had ample time to investigate Mr. Hartman and his allegations. (Br. of U.S. at n. 24).

Of course, counsel was in trial. Trial was held on Thursday, Friday, and Tuesday. Mr. Hartman was from Colorado. Defense counsel was not able to interview him until Monday night. The allegations ranged up to 17 years old. Defense counsel suffered from the flu over the weekend. It is a cruel assertion that defense counsel had ample opportunity without a continuance to investigate Mr. Hartman's allegations and his character for veracity. (R.T., Vol. 9, pp. 1640-1650, J.A. 67-73; Vol. 7, pp. 1404-1408, J.A. 48-50).

The refusal to grant a continuance was irrefutable error. Defense could not and did not cross-examine Kyle Hartman. Yet, he was able to extensively challenge the testimony of other "bad character" witnesses put forward by the government.

The Notes of the Advisory Committee on Rule 403 state that "unfair surprise" is a ground favoring exclusion of prejudicial evidence. (See, Br. of Pet. at 9a-10a). But, the Committee suggests that prior notice and continuances should be utilized to avoid prejudicial error. No avoidance measures were utilized in this case. Only stinging error remains.

H. THE CROSS-EXAMINATION OF VERL HADLEY WAS A LAWLESS CHARACTER ASSASSINATION.

The government does little to justify its character assassination of Verl Hadley. (See Br. of Pet. at pp. 15-16 & n. 13

and Br. of U.S. at n. 10). On direct, counsel only asked Mr. Hadley about the issues raised in this case.

> MR. TREBON: I didn't ask him if he ever had sex with any minors. I asked about people involved in this case only.
>
> THE COURT: That's true.

(R.T., Vol. 7, p. 1376, J.A. 123). The cross-examination far exceeded direct examination in violation of Rules 608 and 611(b). The government asserted that Mr. Hadley "puts his character in issue when he takes the stand." (R.T., Vol. 7, p. 1343, J.A. 40). The government is wrong. The defendant, like any other witness merely puts his character for veracity on the line by taking the witness stand.

> A defendant does not "put his character in issue" by merely taking the stand. However by taking the stand, certain evidence of bad character is admissible to attack defendant's credibility as a witness.

Moore's Federal Practice, Sec. 404.12 [Character of the Aceused] (2nd Ed. 1988). The broad character assassination was improper and constituted extreme, unfair prejudice. *Abel* does not support the government's position within the circumstances of this case. *United States v. Abel*, 469 U.S. 45, 55-56 (1984). The government was also allowed to introduce extrinsic evidence not allowed by Rule 608(b).

The use of alarming prior bad act evidence rendered the trial unfair. Intelligent use of the proposed stipulation or judicial admission would have given a fair trial to both parties.

Respectfully submitted,

JOHN TREBON
Security Pacific Bank Building
121 E. Birch Avenue, Suite 207
Flagstaff, Arizona 86001
(602) 779-1713
Counsel for Petitioner